IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. ASSA ABLOY AB, *et al.*, *Defendants.*	Civil No. 1:22-cv-02791-ABJ

DEFENDANTS' OPOSITION TO LAW PROFESSORS' MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Defendants respectfully oppose the motion by Herbert Hovenkamp, Erik Hovenkamp, A. Douglas Melamed, Steven C. Salop, and Jennifer E. Sturiale for leave to file an *amicus* brief (ECF No. 54). Although neither the movants here nor the *amici* previously granted leave to file a brief disclosed that they support the United States as required by Local Civil Rule 7(o)(2), they share the government's view that defendants should have a special burden in merger cases involving divestitures of overlap assets. Another *amicus* brief echoing the government's position is inappropriate, particularly as defendants are limited to a single 12-page brief. Moreover, far from aiding the Court in its consideration of how to follow the straightforward burden-shifting framework under *United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990), movants' proposed brief practically ignores that case, instead offering illogical arguments urging the Court to depart from binding precedent.

Defendants recognize that granting permission to file an *amicus* brief is within the sound discretion of the Court. But that permission should not be granted unless "the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in

the parties' briefs." *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 59 (D.D.C. 2019). Courts have found that potential *amici* fail to meet that requirement when they merely recite information or arguments already available to a party in the litigation. *See, e.g., id.* (denying motion to file *amicus* brief); *Vanda Pharm., Inc. v. FDA*, 436 F.Supp. 3d 256, 277 (D.D.C. 2020) (same); *Iacangelo v. Georgetown Univ.*, 2009 U.S. Dist. LEXIS 151385 at *4 (D.D.C. 2009) (same); *Georgia v. Ashcroft*, 195 F. Supp.2d 25, 33 (D.D.C. 2002) (same).

Movants do not bring a unique perspective to this case. They wish to argue that the Court should endorse a special rule that gives defendants "the burden of proving that the divestiture they propose will sufficiently solve the competition problems created by the [unremedied] merger." Proposed *Amicus Curiae* Brief of Law Professors, ECF No. 54-3 ("Proposed Brief") at 3. That is exactly what the government will argue. *See* Transcript of December 5, 2022 Status Conference 6:4–7 ("I will say that it's defendants' burden, in order to show that this divestiture remedy will protect competition and protect the competitive intensity between—that is going to be lost between the two parties here.").

In requesting that the parties brief the issue of the legal standard that might apply at trial, the Court set sensible limits of 12 pages per side. Allowing both the government and two different sets of allies to file separate briefs supporting the same position would be unfair to defendants, especially given the limited opportunity defendants have to address this issue alongside others in their brief. There is no need for this piling on. *See Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J.) ("[A]micus curiae briefs [] filed by allies of litigants [that] duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigants' brief… are an abuse.").

Movants' proposed *amicus* brief is also meritless. Their principal justification for placing the burden on the defendants is that doing so "is contemplated by the procedures required by the Hart-Scott-Rodino Act." Proposed Brief at 1. But Hart-Scott-Rodino has nothing to do with the issue before the Court. The controlling precedent on burden shifting, *Baker Hughes*, makes no reference to Hart-Scott-Rodino whatsoever. This is unsurprising given that Hart-Scott-Rodino provides only for a premerger notification process while having no impact on substantive law. The Federal Trade Commission emphasized this point when it first promulgated regulations under the Act: "The [Hart-Scott-Rodino] amendment to the Clayton Act does not change the standards to be used in determining the legality of mergers and acquisitions." FTC, Mergers and Acquisitions Proposed Rulemaking, 41 Fed. Reg. 55488 (Dec. 20, 1976).

The substantive law at issue, the structural presumption, comes from the 1963 Supreme Court case *United States v. Philadelphia National Bank*, 374 U.S. 321. The proper allocation of burdens when merging parties seek to rebut that presumption cannot turn on Hart-Scott-Rodino given that the Act was not passed until over a decade later in 1976. Movants' fanciful arguments about Hart-Scott-Rodino therefore waste the Court's and the parties' time.

Similarly, Movants' position flatly contradicts *Baker Hughes*'s holding that all a defendant must do to rebut the presumption of anticompetitive effects from a merger is "show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition." 908 F.2d at 991. Movants do not even attempt to address that issue in their brief. They reference *Baker Hughes* only once without discussion and at the end of their brief, Proposed Brief at 9, effectively ignoring the controlling precedent in this Circuit and therefore providing nothing useful for the Court to consider.

For the foregoing reasons, defendants respectfully request that the Court deny the motion by Herbert Hovenkamp, Erik Hovenkamp, A. Douglas Melamed, Steven C. Salop, and Jennifer E. Sturiale for leave to file an *amicus* brief.

Dated: January 9, 2023

Respectfully submitted,

/s/ Justin W. Bernick (with permission)
Justin W. Bernick (DC Bar No. 988245)
Charles A. Loughlin (D.C. Bar No. 448219)
William L. Monts, III (DC Bar No. 428856)
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, D.C. 20004
(202) 637-5600
justin.bernick@hoganlovells.com
chuck.loughlin@hoganlovells.com
william.monts@hoganlovells.com

/s/ David I. Gelfand
David I. Gelfand (D.C. Bar No. 416596)
Daniel P. Culley (D.C. Bar No. 988557)
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2112 Pennsylvania Avenue, NW
Washington, DC 20037
Telephone: (202) 974-1500
Facsimile: (202) 974-1999
dgelfand@cgsh.com
dculley@cgsh.com

Counsel for Defendant
ASSA ABLOY AB

/s/ Paul Spagnoletti (with permission)
Paul Spagnoletti
Arthur J. Burke
Greg D. Andres
Nikolaus J. Williams
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10017
(212) 450-4000
paul.spagnoletti@davispolk.com
arthur.burke@davispolk.com
greg.andres@davispolk.com
nikolaus.williams@davispolk.com

Jesse Solomon (DC Bar # 998972)
DAVIS POLK & WARDWELL LLP
901 15th Street, NW
Washington, DC 20005
(202) 962-7138
jesse.solomon@davispolk.com

Counsel for Defendant
Spectrum Brands Holdings, Inc.